State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

ON EMERGENT RELIEF

OAL DKT. NO. HMA 13843-09

SPRINGVIEW PHARMACY,

Petitioner,

v.

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES,

Respondent.

_____

William Nossen, Esq., for petitioner (Law Offices of Alan Zegas, attorneys)

Dianna Rosenheim, Deputy Attorney General, for respondent (Anne Milgram, Attorney General of New Jersey, attorney)

BEFORE **LESLIE Z. CELENTANO,** ALJ:

Petitioner, Springview Pharmacy ("Springview"), moves for emergent relief seeking a stay of termination of the present provider Medicaid number pending completion of the hearing before the Office of Administrative Law.

On December 10, 2009, petitioner pharmacy drug store appealed the denial of its Medicaid provider application by the Division of Medical Assistance and Health Services (DMAHS). On December 14, 2009, petitioner filed an application for emergency relief, pursuant to N.J.A.C. 1:1-12.6, with the Director of the Division of Medical Assistance

and Health Services (DMAHS) to stay the termination of the present provider numbers pending the completion of the OAL hearing.

The matter was transmitted to the Office of Administrative Law on December 14, 2009 and heard on December 17, 2009.

FACTUAL DISCUSSION

Based on the evidence presented through the petition, the representations and oral arguments I **FIND** as **FACT**.

1. Petitioner, Springview, began operating at its former location in approximately 1995, and in May 1995 became a Medicaid provider. Springview is owned 90% by Chibuzo Njeze and 10% by his wife.

2. In 2006 Mr. Njeze pled guilty to tax evasion. After he admitted to evading taxes, he provided authorities with information about illegal drug activities including fraudulent prescriptions being passed at his pharmacy. Based upon the information he provided, his guilty plea and the repayment of $80,000 in taxes, penalties and interest, Mr. Njeze was placed on probation for two years. The January 2006 sentencing led to the Board of Pharmacy action for the suspension or revocation of the license of Mr. Njeze, resulting in a consent order being entered into in April 2008. The consent order states that:

    i. Respondent is hereby reprimanded for violating N.J.S.A. 45:1-21(f), engaging in conduct that constitutes a crime of moral turpitude.

    ii. Respondent's license to practice pharmacy is placed on probation for two (2) years from the date of entry of this Order, with no active restrictions on the license provided respondent complies with all Federal and State laws.

The probationary period resulting from the reprimand runs until April 9, 2010.

3. Prior to the reprimand in the criminal matter, Springview was ordered to pay civil penalties, ordered to cease and desist and order to provide a corrective action plan by the New Jersey Board of Pharmacy for multiple violations of Board regulations. The fine assessed for the violations was $5,600. In the certification petitioner acknowledged that the "action taken against me by the Board herein is a matter of public record, and the Board's letter and this certification are public documents."

4. After many years at its prior location, a new pharmacy was constructed nearby which necessitated a new application to Medicaid to continue as an approved provider. The new application was signed May 5, 2009 with the signature appearing underneath a certification that "…the information furnished on this application is true, accurate and complete…"

5. The May 2009 enrollment application was denied because of answers that were deemed to be false. DMAHS has not sought a penalty of exclusion which includes suspension, debarment or disqualification. Springview may reapply in one year.

6. DMAHS denied the application based on responses given to two questions on the application. Question 36 asks if anyone named on the application has "ever been the subject of any past or pending license suspension, revocation or other adverse licensure action in this State or any other jurisdiction?" DMAHS determined that the applicant failed to reveal two Board adverse licensure actions. One was the consent order, reprimand and probation which resulted from an action seeking suspension or revocation of Mr. Njeze's pharmacy license. The probation was in place at the time of the application. The second adverse action was the admission of violations of the Board's rules which resulted in the

payment of civil penalties, an order to cease and desist and having to submit a corrective action letter. Question 37 asks if a person or entity listed has "ever been, or currently are, indicted, charged, convicted of, or pled guilty or no contest to any federal or state crime or offense in this State or any other jurisdiction?" Mr. Njeze's response was that he had "pled guilty to one count of tax evasion in 2006, which resulted in fines. The case was administratively closed and no license suspension or revocation was instituted." This response was deemed false because the criminal action resulted in two years' probation, restitution and fines and action instituted by the Board to attempt to revoke or suspend his license.

7. The denial letter indicates Mr. Njeze's provider number will be terminated on December 19, 2009. Medicaid clients were notified of other available area pharmacies.

DISCUSSION

The New Jersey Supreme Court has set forth a four-prong test for determining whether an applicant is entitled to emergent relief. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982). The factors include:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
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> 2. The legal right underlying petitioner's claim is settled;
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> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
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> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
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> [Ibid.]

The four prong requirement must be read in the conjunctive and not the disjunctive, and therefore, if petitioner cannot establish even one of these prongs, then the relief requested must be denied.

"A preliminary injunction should not issue where all material facts are controverted. Thus, to prevail on an application for temporary relief, a [petitioner] must make a preliminary showing of a reasonable probability of ultimate success on the merits." Crowe, supra, 90 N.J. at 133. Courts recognize that the New Jersey Medicaid program is operated for the benefit of the recipients of medical assistance, and not for the benefit of providers of services. See Monmouth Medical Center v. State, 80 N.J. 299, 302 (1979), cert. den. 444 U.S. 942 (1979).

Emergent relief is an extraordinary remedy which should be granted only in limited circumstances. American Tel. & Tel. Co. v. Winback & Conserve Program, 42 F.3d 1421, 1426-27 (3d Cir. 1994), cert. denied, 514 U.S. 1103 (1995); Frank's GMC Truck Center v. General Motors Corp., 847 F.2d 100, 102 (3d Cir. 1988). It is clear that the grant of a stay "is not a matter of right, even if irreparable injury might result to the appellant." Virginia Railway v. United States, 272 U.S. 658, 672, 47 S. Ct. 222, 71 L. Ed. 463 (1926). Rather, this extraordinary relief of a stay of an administrative decision depends upon judicial discretion to be exercised as warranted by the particular circumstances of each case. Ibid.

In order to succeed on the merits, Petitioner bears the burden of proving that DMAHS improperly denied the provider application. Both federal and State statutes authorize DMAHS' regulatory standards for its providers. Federal law requires DMAHS to:

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan ...as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care

> and services are available to the general population in the geographic area;
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> [42 U.S.C.A. 1396a(a)(30)(A)].

The New Jersey Legislature adopted a statute consistent with federal law which provides in relevant part:

> the department shall (a) develop and employ such methods and procedures relating to the utilization of and the payment for medical care and services available under the plan as may be necessary to safeguard against unnecessary utilization of such care and services;
>
> (b) Assure that payments (including payments for any drugs provided under the plan) are not in excess of reasonable charges (reasonable costs in the instance of inpatient hospital services) consistent with efficiency, economy and quality of care;
>
> (c) Prescribe standards that providers must meet;
>
> [N.J.S.A. 30:4D-12.]

Petitioner has the burden to prove its fitness to serve as a Medicaid provider. Scollo v. DMAHS (HMA 5029-92) 93 N.J.A.R. 2d. (DMA) 23 at 4, 8-9 (DMAHS must consider indications about petitioner's "ability to deal honestly with governmental funded health care programs which rely on the integrity of providers to honestly deliver quality health care services to the neediest citizens of our state.")

With regard to false statements on a Medicaid provider application, the DMAHS Director has recognized that "the regulation simply does not require that the provider intended to deceive, manipulate, or defraud Medicaid, in order for an application to be denied. Rather, the mere submission of false information is grounds for denial. Indeed, a provider must be held to a high standard in order to preserve the integrity of the Medicaid program." Comm-Unity v. DMAHS OAL DKT. NO. HMA 1721-07 & HMA 3275-07 decided August 7, 2008, app. pending (A-235-08T1).

DMAHS has consistently required that applications be true, accurate and complete in order to participate in the program. See New Lucy Pharmacy v. DMAHS

OAL Dkt No. HMA 3090-09 and 1624-09 consolidated; Oakland Pharmacy v. DMAHS HMA 05062-09; Cagan's Pharmacy v. DMAHS HMA 05069-09 (no final agency decision yet); Newark Drugs v. DMAHS HMA 3323-09 (nvolving an emergent application to hold open the provider number); Comm-Unity v. DMAHS HMA 1721-07 (on appeal to the Appellate Division, A-0235-08T1); Mi Farmacia v. DMAHS, HMA 9969-06; Surgi-Med Pharmacy and Jamil Tabussam v. DMAHS, HMA 3635-06.

In Surgi-Med, the ALJ held: "[t]he requirement that a false statement be made willfully in order to deny an application does not appear in N.J.A.C. 10:49-11.1(d)(22)[.]" Further the applicant's "failure to investigate and verify the information he provided before he certified to its accuracy was the equivalent, for purposes of the Medicaid program, of a willful failure to provide truthful responses on his application." Thus, the ALJ concluded petitioner provided false information on his application for participation, willfully or by inexcusably irresponsible omission and the agency properly denied his application pursuant to N.J.A.C. 10:49-11.1(d)22.

In Mi Farmacia v. DMAHS, where the applicant provided false information on its application, the court stated: "As noted in Surgi-Med Pharmacy, supra. N.J.A.C. 10:49-11.1(d) does not require that a false statement be made willfully in order to deny an application." Mi Farmacia v. DMAHS, Initial Decision, HMA 9969-06 April 30, 2008. If a provider is confused, the provider is "charged with the responsibility to investigate and verify the information he provided before he certified to its accuracy. He failed to do so. Therefore, Lloyd's false statement, willful or otherwise, is sufficient for DMAHS to deny the application." Ibid.

The ALJ in Mi Farmacia held:

> It is reasonable that DMAHS review an application as submitted for purposes of efficiency and efficacy. Deference is given to regulatory agencies, which interpret their complex regulations. See Barone v. Department of Human Serv., 210 N.J. Super. 276, 285 (App. Div. 1986), aff'd, 107 N.J. 355 (1987). When an agency acts within its legislatively delegated authority and adheres to its duly promulgated rules and regulations, deference should be given to the view

> of those charged with the responsibility of implementing legislative programs. Ibid. Indeed, in matters where DMAHS provides limited payment for equipment sought by a recipient, the Supreme Court has observed that "an agency administering so vast and complex a program can well determine that . . . choices must be made . . . . Judicial supervision of such classifications would be unwise." Dougherty v. Department of Human Serv., 91 N.J. 1, 7 (1982). DMAHS, acting within its legislatively delegated authority, denied Mi Farmacia's application pursuant to N.J.A.C. 10:49-11.1(d).
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> [Mi Farmacia v. DMAHS, initial decision HMA 9969-06 April 30, 2008.]

See also Senape v. Constantino, 740 F. Supp. 249, 254 (1990), (stating that the interpretation of the agency responsible for drafting and administering the regulations on hearings for provider re-enrollment applications is entitled to deference).

In New Lucy Pharmacy, the ALJ noted:

> Petitioner subsequently settled the [BOP] matter by signing an acknowledgment, agreeing to cease and desist from engaging in the violative conduct, paying a $975 penalty and providing the BOP with a letter of correction. Significantly, the letter from BOP states: “Any disposition by way of settlement will be a public record and will have the same effect as an order of the Board.” I find that such public disciplinary action as well as the payment of a monetary penalty is clearly adverse licensure action and therefore should have been disclosed on the provider application.
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> [New Lucy Pharmacy v. DMAHS, OAL Dkt No. HMA 3090-09 and 1624-09 consolidated, page 3 of the final agency decision.]

The ALJ concluded that the fine and order that would be a matter of public record and constitutes public disciplinary action. Ibid. Similarly in this matter, the petitioner acknowledges the conduct charged, agrees to cease and desist, pay the fine, do a corrective action letter, and acknowledges that the matter is a matter of public record.

Medicaid providers do not have a protected property interest in continued

participation in the program. River Nile Invalid Coach & Ambulance, Inc. v. Velez, 601 F. Supp. 2d 609 (D.N.J. 2009). River Nile involved a New Jersey Medicaid transportation provider that wanted to continue to provide Medicaid services and be paid directly by DMAHS even though DMAHS had determined, and obtained authorization of its State plan amendment, to change to a single statewide broker for transportation services. The court confirmed that providers must be given a hearing relating to complaints arising out of the claim payment process (for services already rendered), but there is no similar guarantee regarding issues involving the provider's status; for those issues, providers may (or may not) be granted a hearing. N.J.A.C. 10:49-9.14(b). Id. at 20-22.

Based upon the statutes, rules and case law, as I am not satisfied that Springview has shown a likelihood of prevailing on the merits of the underlying claim, and the legal right underlying the petitioner's claim is not settled.

In order to succeed, a party requesting extraordinary relief must also show that it will suffer "substantial, immediate and irreparable harm" in the absence of relief. Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). A risk of irreparable harm alone, however, does not suffice. It is well-settled that an extraordinary relief will never be ordered unless from the pressure of urgent necessity. Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303 (E & A 1878); see also Continental Group, Inc. v. Amoco Chem. Corp., 614 F.2d 351, 359 (3d Cir. 1980)("There must be a clear showing of immediate, irreparable harm or a presently existing actual threat.") The requested extraordinary relief "must be the only way of protecting the plaintiff from harm." Instant Air Freight, supra, 882 F.2d at 801. Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages. Crowe, supra, 90 N.J. at 133. Under all of the circumstances, Springview has not demonstrated that it would suffer irreparable harm without the requested relief.

Finally, Springview must establish "that the harm to [it] if the injunction is denied will be greater than the harm to the opposing party if the injunction is granted." Ispahani

v. Allied Domecq Retailing USA, 320 N.J. Super. 494, 498 (App. Div. 1999). Springview has failed to demonstrate that the equities are in its favor. Springview argues that it provides benefits to the overall community as a community pharmacy (which it can remain). This is an insufficient basis to require that public funds be paid to a provider who does not meet the requirements for admission into the program. DMAHS and OMIG must protect Medicaid beneficiaries and the funding of the Medicaid program by insuring Medicaid providers are held to high standards of integrity.

The State Medicaid Program is heavily regulated by federal and State law, which holds DMAHS responsible for contracting with responsible Medicaid providers that know and comply with the program's laws and regulations. See N.J.A.C. 10:49-1.4(f). Applicants who demonstrate an inability to comply with the regulations or fail to be completely honest and forthcoming in their dealings with the program must be subject to administrative oversight in order to protect the program and public funds from exploitation by fraud or abuse. It is unfortunate that public assistance programs funded by the taxpayers of the State of New Jersey are often subject to fraud and abuse. Therefore, the Medicaid program and the OMIG must be diligent in their efforts by denying enrollment to those who do not demonstrate the highest standards of honesty and integrity. As such, the harm to Springview in the loss of Medicaid reimbursement for Medicaid prescriptions which it no longer has to fill, cannot be greater than the harm to the State, which would be forced to pay a provider that has not demonstrated integrity, care and honesty. Balancing the equities in this case requires that the Medicaid program be protected, and a stay be denied.

Moreover, Medicaid clients will not be injured. Federal law requires that payments to Medicaid providers must be sufficient to enlist enough providers so that services under the plan are available to recipients at least to the extent that those services are available to the general population. 42 C.F.R. § 447.204. 42 U.S.C.A. § 1396a(a)(30). If Springview cannot serve Medicaid beneficiaries, the eligible clients will be transferred to other area providers.

CONCLUSION

Based upon the foregoing, I **CONCLUDE** that petitioner has failed to meet the four prong standard set forth in Crowe, supra, 90 N.J. 126, for granting injunctive relief.

ORDER

It is therefore **ORDERED** that the petition for emergent relief be and hereby is **DISMISSED**.

This order on application for emergency relief may be adopted, modified or rejected by the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

December 18, 2009
DATE

LESLIE Z. CELENTANO, ALJ

dr